(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser."

The defendants argue that because of Order (6) of the judgment obtained by defendant against Chong Ling and Tan in Civil Suit No. 236/68 "the application for permission to assign rights (Bearing serial No. 551 . . . executed by the first defendant in favour of the second defendant is null and void", Tan had no title to pass to the plaintiff.

It should be noted that though defendant commenced Civil Suit No. 236/1968 against the approved applicant and Tan on November 20, 1968 it was not until January 4, 1971 that judgment in default of appearance was obtained against the two of them. In the meantime, Tan had executed a transfer of the land in favour of the plaintiff (on April 27, 1970), and this transfer was registered on the Q.T. on June 26, 1970.

It could therefore not be said that this registration, whatever the effect of the judgment in Civil Suit No. 236/1968 may be subsequently, had at the time it was effected, been an insufficient or void instrument.

There is no evidence whatsoever, nor indeed was it even suggested that the plaintiff was aware that Civil Suit No. 236/1968 had been filed by the defendant against the approved applicant and Tan, so that even if the registration of the transfer had been effected by means of an insufficient or void instrument, the proviso to subsection (3) of Section 340 would apply for indeed he was a purchaser "in good faith and for valuable consideration", to the tune of $12,000. In other words his title is indefeasible.

The defendant can only blame himself for this state of affairs. One would expect him to file a caveat at least at the time he filed the Civil Suit, on November 20, 1968, to prevent further transactions on this land.

I should perhaps say that I am inclined to believe that Tan was not aware that the Civil Suit had been filed against her. Under cross-examination she denied ever having received any writ of summons or any court document whatsoever connected with that action, and having moved, was not alerted by the alleged posting of a copy of the summons on the door of her previous abode. However her awareness or otherwise cannot affect the main issue.

The defendant also argues that subject to its being set aside, the judgment in Civil Suit No. 236/68 is conclusive as between the parties and their privies. . . .

No exception can be taken to this statement of the law. However, can the plaintiff be said to be privy to either of the parties in that Civil Suit?

The defendant submits that the expression "privies" includes privies in estate such as a vendor and purchaser, and because there had been no appeal against the judgment in Civil Suit No. 236/68 it would be conclusive as between the parties and their privies, and that defendant may plead the former judgment as an estoppel. Reference was made to *Whartons* "Law Lexicon" 14th Edition Page 802 which reads —

"Privies, those who are partakers or have an interest in any action or thing, or any relation to another. They have been said to be of six kinds:—

(1) . . . .
(2) . . . .
(3) Privies in estate, as grantor and grantee, lessor and lessee, assignor and assignee, etc.
(4) . . . .
(5) . . . .
(6) . . . ."

Clearly this is casting the net too wide. *Spencer-Bower and Turner* on *Res Judicata* 2nd Edition at page 211, paragraph 243 is enlightening on this point:

"The following are illustrative cases in which persons, admittedly not parties, have been held not to be privies either, but strangers to the estoppel. . . . A person who has merely given financial assistance to a party does not thereby become his privy, nor is a purchaser of land the subject of litigation, where the land itself is not bound by the judgment, deemed a privy of any party to such litigation and judgment."

The judgment in Civil Suit No. 236/68 does not bind the land itself, *i.e.* it is not a judgment *in rem*. The plaintiff is not therefore a privy to either party. In consequence the defendant cannot raise the defence of estoppel *per rem judicata*, and this defence must also fail. Accordingly there shall be judgment for the plaintiff in accordance with prayers Nos. (i), (ii), (iii) and (iv) and costs.

Judgment for the plaintiff.

Solicitors: *Stanley Ponniah, Ng & Soo; Joseph & Son.*

WONG KIM FATT v. LEONG & CO. SDN. BHD. & ANOR.

[O.C.J. (Chang Min Tat J.) June 20, 1975]
[Kuala Lumpur — Civil Suit No. 652 of 1974]

Companies — Articles of Association — Shares — Compulsory requisition of shares — Effect of — Companies Act, 1965, ss. 14(1) & 122(1).

The Company had two shareholders. In exercise of the powers under the Articles of Association the majority shareholder requisitioned for the purchase of the holdings of the other. The other resisted the attempt.

Held: the Articles empowering the requisition of shares of the only other holder is not repugnant to the Companies Act. It was purely a matter of contractual obligation and the plaintiff must be held to the obligation he had undertaken.

[Editorial Note: See [1975] 1 M.L.J. 20 & xxi.]

Cases referred to:-

(1) *Panorama Developments (Guildford) Ltd.* v. *Fidelis Furnishing Fabrics Ltd.* [1971] 3 All E.R. 16, C.A.
(2) *Browne v. La Trinidad* (1887) 37 Ch.D. 1.
(3) *Foss v. Harbottle* (1843) 2 Hare 461.
(4) *MacDougall* v. *Gardiner* (1875) 1 Ch. D. 13.
(5) *Welton* v. *Saffery* [1897] A.C. 299.
(6) *Ebrahimi* v. *Westbourne Galleries Ltd.* [1972] 2 All E.R. 492.
(7) *Scott* v. *Liverpool Corporation* 44 E.R. 1297

CIVIL SUIT.

Lim Ewe Hock for the plaintiff.

Syed Ibrahim for the first defendant.

Peter Mooney for the second defendant.

Chang Min Tat J.: The plaintiff, a minority shareholder, holding 50,000 shares in a private limited company as against the 250,000 shares held by the only other shareholder the second defendant resisted the latter's attempted compulsory requisition of his shares under the Articles of Association and brought this action for various declaratory orders for the purpose of establishing his right to hold on to his shares. He joined in the company as the first defendant.

The relevant article was Article 21(d) of the Articles of Association. It reads:

"21.(d) The holders for the time being of seven-tenth of the issued capital of the company may at any time serve the company with a requisition to enforce the transfer of any particular shares not held by the requisitionists. The company shall forthwith give to each registered holder of such shares notice in writing of the requisition (with a copy of this Clause and of Article 21 (e) sub-joined) and unless within fourteen (14) days such holder shall have entered into an Agreement in writing with the requisitioning members for the sale to them of his shares, he shall at the expiration of the said period be deemed to have sold and the requisitioning members shall be deemed to have purchased his said shares at a price or value to be determined in accordance with these Articles."

The second defendant's 250,000 of the 300,000 shares issued established him as the holder of more than seven-tenths within the scope of this article. In purported exercise of his rights he made a requisition through the company's secretaries. In accordance with his request, the first defendant wrote on May 31, 1974 advising the plaintiff of this requisition. The letter closely followed the wording of Article 21(d).

On June 6, 1974 the plaintiff replied through his solicitors denying the right to requisition. In the letter his solicitors asserted that Article 21(d) must be read subject to the other articles and subject to the Companies Act, in particular section 14(1) and section 122(1). The main contention was that if the requisition went through the company would then have only one shareholder who would be the only director. The main reliance placed was that there could be no incorporation unless there were at least two shareholders. No illegality was however alleged.

At the hearing Mr. Lim Ewe Hock for the plaintiff first raised the issue of illegality. He contended that no meeting of the directors had been held to consider the second defendant's notice to requisition the plaintiff's share and therefore no instructions were ever given to the secretaries who consequently had no authority to issue the notice of requisition dated May 31, 1974. He submitted that the duties of the secretaries were ministerial and administrative and never managerial, that the secretaries should not assume any executive or managerial powers in the absence of authority of the Board and that their duties with respect to notices to members and others were only exercisable under the direction of the Board. He read various passages from *Palmer's* Company Law, 20th Edition, from pages 587 to 590, to substantiate his arguments. He therefore contended that the secretaries had no authority whatsoever to issue the notice and that the notice was bad and invalid affecting all subsequent proceedings.

Encik Syed Ibrahim for the company however contended that the secretaries must carry out the orders of the directors and that in the circumstances of the case where the only two directors were at cross-purposes it would be meaningless to convene a meeting of the Board.

Mr. Mooney for the second defendant in his turn contended against the invalidity of the notice. He instanced notices, as in precedents nos. 373, 378, 379, 397, 398 and 477 in *Palmer's* (17th Edition) Precedents, issued by the secretary by order of the Board of Directors and notices issued by the secretary in his own name, as in precedents nos. 301, 377, 380, 385, 395, 421, 483 and 489. A modern company is now a complex organisation and the duties of the secretary of an incorporated company have become heavy and manifold. He is today an important person, *per* Lord Denning M.R. in *Panorama Developments (Guildford) Ltd.* v. *Fidelis Furnishing Fabrics Ltd.*[1] at pages 18-19. Mr. Mooney also drew the attention of the court to the fact that neither in the letter of protest nor in his statement of claim had the plaintiff taken objection to the requisition as being invalid. Finally, he submitted that courts would not take notice of any technical complaints if these complaints could be taken care of by lodging objection at the proper time: *Browne* v. *La Trinidad*[2] at page 9 *per* Cotton L.J. and at page 17 *per* Lindley L.J., *Foss* v. *Harbottle*[3] and *MacDougall* v. *Gardiner*.[4]

With respect, I do not think it is really necessary to go into the various authorities, as among the passages read by Mr. Lim is the following passage at page 591: —

"Apart from certain statutory duties... the duties of the secretary are not fixed by law: they are those which are assigned to him either by the company under its articles or under his contract of services with the company, or, as is normally the case, by the directors. In practice, a number of duties will be implied by a course of conduct...."

The validity of Mr. Lim's arguments could therefore have been tested by evidence, which was now not within reach of this court.

In the light of this passage, the objection by Mr. Mooney to this complaint being taken at this late stage would appear to have some substance.

But for myself, I do not (with respect) consider that there is any substance in the complaint. Service on the company under Article 21(d) was effected by service on the secretaries and on a proper and reasonable construction of the article, the giving of the notice cannot be regarded as managerial or executive. The Board of Directors not having any powers under the Articles of Association to prevent the requisition by the majority holder, nothing turns on the decision of the Board. Under such a circumstance, the transmission of the notice to the minority shareholder becomes at the most an administrative function.

Mr. Lim made two other points. The first of them was that in the circumstances pertaining to this case Article 21(d) was repugnant to the Companies Act. He did not say that this sub-article was repugnant under all circumstances. Indeed it is in common form and is part of the provisions open to a private limited company to prevent the entry of other persons into the fold. What he said however was that as in this case where there were only two directors, if the majority holder was to requisition the shares of the

other shareholder it would leave the company with one shareholder and a Board of one director. This he contended made for repugnancy and incapacity to function since in so many aspects of management the company could only work through two or more members. He thought if the second defendant succeeded there would be an interregnum in the government of the company. Perhaps he meant suspended animation.

He made two concessions, one was that a member was bound by the Articles of Association as a matter of contractual obligation which he had undertaken by subscribing thereto. With respect, he is of course right. To contend otherwise would mean he had to prove, for example, the following passage from the judgment of Lord Herschell M.R. in *Welton* v. *Saffery*,[5] at page 315, wrong:

"Section 16 of the Act of 1862 provides that the articles of association, when registered, shall bind the company and the members thereof to the same extent as if each member had signed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations contained in such articles, subject to the provisions of this Act. The articles thus become in effect a contract under seal by each member of the company, and regulate his rights. They cannot, of course, diminish or affect any liability created by the express terms of the statute; but, as I have said, the statute does not purport to settle the rights of the members *inter se*, it leaves these to be determined by the articles (or the articles and memorandum together), which are the social contract regulating those rights.

I think it was intended to permit perfect freedom in this respect. It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights *inter se*. Such rights can only be enforced by or against a member through the company, or through the liquidator representing the company; but I think that no member has, as between himself and other member, any right beyond that which the contract with the company gives."

Section 16 of the Act of 1862 is now section 33 of our Companies Act.

The other was that after incorporation the company did not cease to exist if the membership fell below two. This could be a possible situation where in a corporation of a legal minimum of two members one of them died: see *Palmer's* on Company Law (20th Edition) pages 127 & 129.

He also referred to section 36 of our Companies Act which reads: —

"36. If at any time the number of members of a company (other than a company the whole of the issued shares of which are held by a holding company) is reduced below two and it carries on business for more than six months while the number is so reduced, a person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with fewer than two members shall be liable for the payment of all the debts of the company contracted during the time that it so carries on business after those six months and may be sued therefor, and the company and that member shall be guilty of an offence against this Act if the company so carries on business after those six months.

Penalty: Two hundred and fifty dollars. Default penalty."

However he contended that this section covered the case where one of the two appointed directors had died. Upon such a happening or upon the vacating of office by one of the two directors under section 75 the remaining director under the provisions of section 76 had a grace period of six months to appoint another director at least to bring the number up to a minimum of two.

With respect I cannot agree that on a proper and reasonable construction, section 36 of the Companies Act applied only to the death of a member. The section spoke of reduction, which must include resignation or loss of right to remain as a member.

In my view, too, and with respect, the vacating of office of a director under section 75 can either be voluntary or involuntary. It would be the latter case if a director by reason of the loss of his holdings lost his right to his directorship and was disqualified from office. This interpretation would cover therefore the case of the plaintiff if second defendant succeeded. So long as the second defendant upon acquiring the shares of the plaintiff took steps to register another shareholder by transfer of some of his shares to him and to appoint another director or directors within the grace period he would not be contravening the provisions of the Companies Act. Whether he would do so within this period is a matter that is left to be seen but is not of concern in this case.

I am therefore with respect of the opinion that Article 21(d) is not repugnant to the Act and that its operation would not result in any illegality even on the facts of this case.

The third point made by Mr. Lim was that assuming that the second defendant had the right to requisition under Article 21(d) he ought not in equity to be allowed to do so. He submitted that this was very much a quasi-partnership since in this incorporation of two persons, both members were active operators in the Stock Exchange which was the reason for the existence of the company, and participated in the company's business in just the same way as if they had been partners. On this contention Mr. Lim said that one partner could not expel another partner and that the proper action would be for the court to allow a winding-up, as in the case of *Ebrahimi* v. *Westbourne Galleries Ltd.*[6] at page 499. Mr. Mooney's reply to this was that if there was any reliance on equity there was nevertheless no equitable construction of an agreement: see *Scott* v. *Liverpool Corporation*[7] at page 1307, or rather there was no difference between law and equity as to the construction of an agreement. In any event the well known maxim is that equity follows the law. He suggested that *Ebrahimi's* case was irrelevant but he thought there were many dicta from that judgment which substantially negatived the case for the plaintiff.

With respect, whatever the sympathies evoked by the sight of a slingless David confronted by a Goliath, there are in my view no facts and no circumstances raising up any equity against the second defendant. It is purely a matter of contractual obligation and the plaintiff must be held to the obligations he had undertaken.

The action is dismissed with costs.

Action dismissed.

Solicitors: *Lim Ewe Hock; Lim Sun Hoe & Co.; Skrine & Co.*